Whistleblower Newsletter
AIR21 Cases

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Contents

TIMELINESS OF COMPLAINT

TIMELINESS OF COMPLAINT: LETTER THAT MERELY CONFIRMS THAT ADVERSE ACTION STILL IN EFFECT

A complaint that revocation of the Complainant's retirement travel pass was in retaliation for safety complaints was not timely where the revocation occurred two years prior to the complaint; a more recent letter merely confirmed that the travel pass revocation was still in effect. ***Friday v. Northwest Airlines, Inc.***, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005).

PROCEDURE BEFORE ARB

PROCEDURE BEFORE THE ARB; MOTION TO EXPAND THE RECORD

In ***Rollins v. American Airlines, Inc.,*** ARB No. 04-140, ALJ No. 2004-AIR-9 (ARB Jan. 7, 2005), the ARB denied the Complainant's motion to submit an expanded administrative record on appeal. The Complainant argued that the expanded record was necessary because the ALJ allegedly had made rulings outside the bounds of the matters briefed and raised in the Respondent's pleadings. The Board noted that the Complainant sought to show that he had presented a prima facie case, but that the basis of the ALJ's decision was that the complaint had not been timely filed.

TIMELINESS OF PETITION FOR ARB REVIEW; LACK OF PROOF OF INVOCATION OF OVERNIGHT DELIVERY GUARANTEE AND LACK OF DILIGENCE IN VERIFYING DELIVERY

In ***Herchak v. USDOL***, No. 03-72203 (9th Cir. Dec. 9, 2004) (unpublished) (case below ARB No. 03-057, ALJ No. 2002-AIR-12), the Complainant had appealed the ARB's finding that the Complainant's failure to file a timely appeal of the ALJ's decision was not excused based on an argument that Airborne Express had failed to deliver the document in a timely matter where the Complainant had not established that he had delivered the document to Airborne Express in time to invoke the overnight delivery guarantee and the Complainant had not been diligent in checking to see if the delivery had been timely made. The Ninth Circuit affirmed the ARB's dismissal of the appeal rejecting the Complainant's contention that the dismissal had been arbitrary and capricious. The court noted that courts have routinely affirmed agencies' strict application of internal regulatory deadlines, and that the "extraordinary circumstances" standard employed by DOL for equitable relief from untimely filings is a high threshold. The case was decided under the Interim Rules.

BANKRUPTCY

BANKRUPTCY; AUTOMATIC STAY OF ARB APPEAL

In ***Merritt v. Allegheny Airlines, Inc.***, ARB No. 05-084, ALJ No. 2004-AIR-13 (ARB Aug. 17, 2005), the Respondent had entered into bankruptcy proceedings. The ARB noted that it has previously held that the Bankruptcy Code's automatic stay provision applies to cases litigated by private parties arising under AIR 21's whistleblower

protection provision. Accordingly, the ARB stayed further proceedings until the automatic stay is lifted or the bankruptcy proceedings are concluded.

SUMMARY JUDGMENT

DISCOVERY; LIMITATION TO ISSUE RELATED TO SUMMARY DECISION MOTION

The ALJ did not abuse his discretion in ***Friday v. Northwest Airlines, Inc.***, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005), in denying the Complainant's motion for additional discovery filed after the ALJ had limited discovery to the issues presented in the Respondent's motion for summary decision.

COVERED EMPLOYER

COVERED EMPLOYER; AIR OPERATOR THAT CARRIES AN EXTERNAL LOAD IS NOT AN AIR CARRIER COVERED BY AIR21

In ***Marsh v. Erickson Air-Crane, Inc.***, 2004-AIR-33 (ALJ May 13, 2005), the Respondent owned helicopters that performed specialized operations such as fire-fighting, logging, construction and hydroseeding, rather than transportation activities. The Respondent held a Part 133 certification, rather than an operating certification under 14 C.F.R. Part 119, making it an air operator rather than an air carrier under FAA regulations. The Complainant argued that because the helicopters have a belly tank, they carry cargo and therefore are air carriers under AIR21. The ALJ, however, was not convinced by the belly tank argument, finding that the Respondent was an air operator that carries only external loads and not an air carriers which transports passengers, cargo or mail.

COVERED EMPLOYEE

COVERED EMPLOYEE; FORMER EMPLOYEE; ALLEGED BREACH OF SETTLEMENT AGREEMENT

In ***Davidson v. Miami Air International, Inc.***, 2005-AIR-3 (ALJ May 20, 2005), the Complainant charged that the Respondent released personnel documents to another airline in response to subpoenas from that other airline in violation of an earlier AIR21 settlement agreement. The ALJ granted summary judgment to the Respondent on the ground that the Complainant was not a covered employee under AIR21. The ALJ acknowledged that AIR21 coverage can extend to former employees, but only in regard to actions by the Respondent which affect the benefits the Complainant is entitled to as a former employee, his possible re-employment, or his ability to seek other employment. The ALJ found that the complaint did not allege any such actions. The ALJ noted that to the extent that the complaint was seeking enforcement of the settlement agreement, the Complainant was in the wrong forum.

BURDEN OF PROOF AND PRODUCTION -- ADVERSE ACTION

ADVERSE EMPLOYMENT ACTION; THREAT UNRELATED TO COMPENSATION, TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT RELATIONSHIP

The Respondent's letter to the Complainant threatening to report him for the unauthorized practice of law if he appeared as a representative in a worker's grievance proceeding was not adverse action under AIR 21; the letter was not related to the Complainant's compensation, terms, conditions, or privileges as a medically-retired former employee of the Respondent. ***Friday v. Northwest Airlines, Inc.***, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005).

ADVERSE EMPLOYMENT ACTION: MERE THEORETICAL POSSIBILITY OF ADVERSE ACTION DOES NOT CONSTITUTE A COGNIZABLE COMPLAINT

The Complainant, a medically disabled retiree, was banned from the Respondent's property and argued that the ban was related to compensation, terms, conditions, or privileges of his employment relationship with the Respondent because it would prevent him from returning to work. The ALJ found that this was not a cognizable ground to establish an adverse employment action, being based on "a theoretical argument based on a theoretical fact which may never occur." The ARB affirmed. ***Friday v. Northwest Airlines, Inc.***, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005).

BURDEN OF PROOF AND PRODUCTION -- PROTECTED ACTIVITY

PROTECTED ACTIVITY; CARRYING OUT AGGRESSIVE AND COMPETENT INSPECTIONS REQUIRED OF A MAINTENANCE SUPERVISOR; SUCH ACTIVITIES DO NOT REQUIRE A FORMAL COMPLAINT TO THE FAA OR A COMPANY HOT-LINE TO BE PROTECTED

In ***Sievers v. Alaska Airlines Inc.***, 2004-AIR-28 (ALJ May 23, 2005), the ALJ found that the Complainant, an aviation line maintenance supervisor, engaged in protected activity when he carried out his required, safety-related duties competently and aggressively, even though some of the defects identified by the Complainant and his staff did not implicate serious safety concerns. *Mackowiak v. Univ. Nuclear Sys. Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-7 (ALJ Feb. 9, 2004), at 23; *Szpyrka v. American Eagle Airlines, Inc.*, 2002-AIR-9 (ALJ July 8, 2002). The ALJ rejected the Respondent's argument that inspection duties were not protected activity because they did not involve a complaint to the FAA or the Respondent's safety "hot line." The ALJ wrote: "For a finding of protected activity, it is sufficient that Complainant carried out his required, safety-related duties: supervising the maintenance of Respondent's aircraft and reporting, repairing, or deferring the repair of any documented defects." Slip op. at 24. The ALJ observed that the Complainant's aggressive performance of his duties was not conducted out of malice, but in an atmosphere of concern over the appropriate balance between safety and economics given a tragic crash of one of the Respondent's flights in January of 2000. The crash was linked to a maintenance issue. Moreover, the Respondent had commissioned a report on its safety procedures in the wake of that crash; the report warned care must be take not to permit economic pressures on the aviation industry to allow a "culture creep" away from an emphasis on safety. These circumstances were well known to the Complainant and his staff.

PROTECTED ACTIVITY; REPORT OF BELIEF OF EXPOSURE TO PESTICIDE SPRAYING MANDATED BY FOREIGN GOVERNMENTS, BUT NOT SUBJECT OT ANY LAW OF THE U.S., IS NOT PROTECTED ACTIVITY WITHIN THE MEANING OF THE WHISTLEBLOWER PROVISION OF AIR21

In ***Mehan v. Delta Air Lines***, ARB No. 03-070. ALJ No. 2003-AIR-4 (ARB Feb. 24, 2005), the ARB granted summary judgment in favor of the Respondent because the Complainant had failed to articulate a viable factual basis for her claim that she had engaged in protected activity. Specifically, the Board wrote: "Reporting to Delta her belief that she had been injured by pesticide spraying that was mandated by foreign governments, but that was not subject to any law of the United States, does not fall within the plain language of § 42121 – providing information or filing a proceeding relating to a violation of Federal air carrier safety laws."

PROTECTED ACTIVITY; COMPLAINTS ABOUT CALL SIGNS AND COMMERCIAL ACTIVITIES

In ***Barker v. Ameristar Airlines, Inc.***, 2004-AIR-12 (ALJ Oct. 7, 2004), the ALJ found that the Complainant's complaints about the Respondent's use of an affiliated company's call signs and its alleged commercial transactions outside the scope of its Part 125 certification were not protected activity because neither allegation related to air carrier safety.

DAMAGES

DAMAGES; CALCULATION OF A TAX EQUALIZATION ADJUSTMENT DOES NOT REQUIRE A TAX EXPERT

In ***Sievers v. Alaska Airlines Inc.***, 2004-AIR-28 (ALJ May 23, 2005), the ALJ accepted the report of Complainant's vocational economic consultant in regard to the calculation of present value of the Complainant's lost earning and tax equalization adjustment ("TEA"). The combined amount totaled over $534,000. The Respondent challenged the TEA on the ground that the consultant was not a tax expert. The ALJ, however, found that there was no expert of any kind at the hearing, that the consultant was eminently qualified as an economics damages expert, and that calculation of a TEA was within his expertise. The ALJ observed that the TEA was based on the fact that the Complainant would receive a large lump sum damages award that would otherwise would have been spread over 12 years (the Complainant's worklife expectancy) and that most of this sum would be taxed at a higher rate as a result. The ALJ found that knowledge of how to calculate a TEA is not so arcane or specialized as to require a tax expert.

COMPENSATORY DAMAGES; CREDIBLE TESTIMONY OF ECONOMIC HARDSHIP; CONSISTENCY WITH PRIOR AWARDS IN SIMILAR CIRCUMSTANCES

In ***Negron v. Vieques Air Link, Inc.***, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004), the Respondent had imposed a transfer on the Complainant in retaliation for his protected activity knowing that the Complainant would not be able

to absorb with the expenses associated with the transfer. The ARB affirmed the ALJ's compensatory damage award of $50,000 under 49 U.S.C.A. § 42121(b)(3)(B)(iii); 29 C.F.R. § 1979.109(b). The Board found that substantial evidence supported the ALJ's award because the Complainant had testified that he had two young children (including an infant) and that, among other hardships, he was forced to sell his automobiles and deplete his family's savings. The Board deferred to the ALJ's finding that the Complainant testimony in this regard was credible, and observed that the amount of compensatory damages awarded by the ALJ was consistent with amounts awarded in similar cases.

AFTER-ACQUIRED EVIDENCE DOCTRINE; ANGRY E-MAIL SENT BY THE COMPLAINANT

In ***Clemmons v. Ameristar Airways, Inc.***, 2004-AIR-11 (ALJ Jan. 14, 2005), the Respondent argued that any back pay award should be cut off as of the date it learned of an inflammatory, angry and improper e-mail sent by the Complainant, a manager, to pilots, which would have resulted in the Complainant's termination from employment (had he not already been terminated). The ALJ, however, found that "extraordinary equitable circumstances existed in that the Respondents' own behaviors induced the e-mail and that absent the disparate treatment of the Complainant, he would not have had cause to send out the angry message." The ALJ therefore concluded that the after-acquired evidence doctrine should not be applied to limit the back pay award.

DISMISSAL FOR CAUSE

DISMISSAL FOR CAUSE; REFUSAL TO COMPLY WITH BOARD'S PAGE LIMITS FOR APPELLATE BRIEFS

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 04-102, 2004-AIR-6 (ARB Dec. 30, 2004) (reissued Jan. 5, 2005), *recon. denied* (ARB Feb. 17, 2005), the ARB dismissed the Complainant's complaint for failure to file a conforming brief. The Board imposes page limits on briefs, and based on prior experience with the Complainant expressly informed her that: "The initial brief should provide original legal argument in support of the Complainant's claims without relying on incorporation of analysis from the Complainant's previous filings." The Complainant thereafter filed a series of motions for enlargement and for other relief, and when she ultimately did file her brief, it was replete with incorporations by reference and references to other filings.

The Board observed that the Federal Rules of Appellate Procedure do not permit incorporation in briefs of documents and pleadings filed in district courts. The Board observed that dismissal of an appeal for failure to file a conforming brief is a very serious sanction, not to be imposed lightly. Nonetheless, the Complainant's failure to conform her brief to the ARB's express and unambiguous directions was blatant. The Board noted that in a previous case involving this Complainant, it had considered the lesser sanction of only requiring the Respondent to respond to the conforming part of the Complainant's brief, but that if the Complainant had relied on the possibility of that lesser sanction, she had seriously misjudged the Board's resolve, as clearly stated in its orders, that unless she filed a conforming brief, the Board

would dismiss her appeal. *See Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004)(Board dismissed Powers's appeal for failure to file a conforming brief)(appeal to the United States Court of Appeals for the Sixth Circuit pending).

VOLUNTARY DISMISSAL

STIPULATED DISMISSAL AGAINST SINGLE RESPONDENT

In ***Davidson v. Miami Air International, Inc.***, 2005-AIR-3 (ALJ May 16, 2005), the Complainant filed a motion to dismiss his complaint with prejudice against one of the Respondents. That Respondent filed a statement voicing no objection to the Complainant's motion. The ALJ interpreted the filing as a stipulated dismissal under Rule 41(a)(1)(ii), and noted that there was split in authority regarding the applicability of that Rule where the dismissal relates only to a single defendant. Since the matter arose in the 11th Circuit which permits such dismissals under Rule 41(a)(1) against a single defendant, the ALJ granted the Complainant's motion.

RELATIONSHIP TO OTHER LAWS

PREEMPTION; STATE EMPLOYEE PROTECTION LAW

In ***Gary v. The Air Group, Inc.***, No. 02-3534 (3rd Cir. Dec. 16, 2004), the Third Circuit held that a pilot's complaint brought under New Jersey's Conscientious Employee Protection Act was not preempted by the Airline Deregulation Act as amended by the Whistleblower Protection program at 29 U.S.C. 42121 where the claim was not "related to" the "service of an air carrier" within the meaning of 49 U.S.C. 41713(b)(3). In so ruling, the court found the Eleventh Circuit's analysis in *Branche v. Airtran Airways, Inc.*, 343 F.3d 1248 (11th Cir. 2003) more persuasive than the Eight Circuit's analysis in *Botz v. Omni Air Int'l*, 286 F.3d 488 (8th Cir. 2002).